

bound by a prior administrative or judicial determination concerning the link.

(2) Any applicant or other person shown in AVS in an ownership or control link to any person cited in a Federal violation notice may challenge the status of the violation covered by such notice in accordance with the provisions of paragraphs (b) through (d) of this section and § 773.25 of this part, unless such applicant or other person is bound by a prior administrative or judicial determination concerning the status of the violation.

(3) Any applicant or other person shown in AVS in an ownership or control link to any person cited in a State violation notice may challenge the status of the violation covered by such notice in accordance with the State program equivalents to paragraphs (b) through (d) of this section and § 773.25 of this part for the State that issued the violation notice, unless such applicant or other person is bound by a prior administrative or judicial determination concerning the status of the violation.

(b) Any applicant or other person who wishes to challenge an ownership or control link shown in AVS or the status of a Federal violation, and who is eligible to do so under the provisions of paragraphs (a)(1) or (a)(2) of this section, shall submit a written explanation of the basis for the challenge, along with any relevant evidentiary materials and supporting documents, to OSM, addressed to the Chief of the AVS Office, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, Washington, D.C. 20240.

(c) OSM shall review any information submitted under paragraph (b) of this section and shall make a written decision whether or not the ownership or control link has been shown to be erroneous or has been rebutted and/or whether the violation covered by the notice remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of § 773.15(b)(1) of this part.

(d)(1) If, as a result of the decision reached under paragraph (c) of this section, OSM determines that the owner-

ship or control link has been shown to be erroneous or has been rebutted and/or that the violation covered by the notice has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, OSM shall so notify the applicant or other person and, if an application is pending, the regulatory authority, and shall correct the information in AVS.

(2) If, as a result of the decision reached under paragraph (c) of this section, OSM determines that the ownership or control link has not been shown to be erroneous and has not been rebutted and that the violation covered by the notice remains outstanding, OSM shall so notify the applicant or other person and, if an application is pending, the regulatory authority, and shall update the information in AVS, if necessary.

(i) OSM shall serve a copy of the decision on the applicant or other person by certified mail, or by any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure. Service shall be complete upon tender of the notice or of the mail and shall not be deemed incomplete because of a refusal to accept.

(ii) The applicant or other person may appeal OSM's decision to the Department of the Interior's Office of Hearings and Appeals within 30 days of service of the decision in accordance with 43 CFR 4.1380 through 4.1387. OSM's decision shall remain in effect during the pendency of the appeal, unless temporary relief is granted in accordance with 43 CFR 4.1386.

[59 FR 54354, Oct. 28, 1994]

§ 773.25 Standards for challenging ownership or control links and the status of violations.

(a) The provisions of this section shall apply whenever a person has and exercises a right, under the provisions of §§ 773.20, 773.21, 773.23, or 773.24 of this part or under the provisions of part 775 of this chapter, to challenge (1) an ownership or control link to any person and/or (2) the status of any violation covered by a notice.

(b) *Agencies responsible.* (1) Except as provided in paragraph (b)(3) of this section—

(i) The regulatory authority before which an application is pending shall have responsibility for making decisions with respect to ownership or control relationships of the application.

(ii) The regulatory authority that issued a permit shall have responsibility for making decisions with respect to the ownership or control relationships of the permit.

(iii) The State regulatory authority for the State that issued a State violation notice shall have responsibility for making decisions with respect to the ownership or control relationships of the violation.

(iv) The regulatory agency that issued a violation notice, whether State or Federal, shall have responsibility for making decisions concerning the status of the violation covered by such notice, i.e., whether the violation remains outstanding, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal, within the meaning of § 773.15(b)(1) of this part.

(2) OSM shall have responsibility for making decisions with respect to the ownership or control relationships of a Federal violation notice.

(3)(i) With respect to information shown on AVS, the responsibilities referred to in paragraph (b)(1) of this section shall be subject to the plenary authority of OSM to review any State regulatory authority decision regarding an ownership or control link.

(ii) With respect to ownership or control information which has not been entered into AVS by a State and with respect to information shown on AVS relating to the status of a violation, State regulatory authorities' determinations are subject to OSM's program authority oversight under parts 733, 842, and 843 of this chapter.

(c) *Evidentiary standards.* (1) In any formal or informal review of an ownership or control link or of the status of a violation covered by a violation notice, the responsible agency shall make a prima facie determination or showing that such link exists, existed during the relevant period, and/or that the violation covered by such notice remains outstanding. Once such a prima facie determination or showing has been made, the person challenging such

link or the status of the violation shall have the burden of proving by a preponderance of the evidence, with respect to any relevant time period—

(i) That the facts relied upon by the responsible agency to establish: (A) Ownership or control under the definition of *Owned or controlled* or *Owns or controls* in § 773.5 of this part or (B) a presumption of ownership or control under the definition of *Owned or controlled* or *Owns or controls* in § 773.5 of this part, do not or did not exist;

(ii) That a person subject to a presumption of ownership or control under the definition of *Owned or controlled* or *Owns or controls* in § 773.5 of this part, does not or did not in fact have the authority directly or indirectly to determine the manner in which surface coal mining operations are or were conducted, or

(iii) That the violation covered by the violation notice did not exist, has been corrected, is in the process of being corrected, or is the subject of a good faith appeal within the meaning of § 773.15(b)(1) of this part; *provided* that the existence of the violation at the time it was cited may not be challenged under the provisions § 773.24 of this part: (A) By a permittee, unless such challenge is made by the permittee within the context of §§ 773.20 through 773.21 of this part; (B) by any person who had a prior opportunity to challenge the violation notice and who failed to do so in a timely manner; or (C) by any person who is bound by a prior administrative or judicial determination concerning the existence of the violation.

(2) In meeting the burden of proof set forth in paragraph (c)(1) of this section, the person challenging the ownership or control link or the status of the violation shall present probative, reliable, and substantial evidence and any supporting explanatory materials, which may include—

(i) Before the responsible agency—

(A) Affidavits setting forth specific facts concerning the scope of responsibility of the various owners or controllers of an applicant, permittee, or any person cited in a violation notice; the duties actually performed by such owners or controllers; the beginning and

ending dates of such owners' or controllers' affiliation with the applicant, permittee, or person cited in a violation notice; and the nature and details of any transaction creating or severing an ownership or control link; or specific facts concerning the status of the violation;

(B) If certified, copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records;

(C) If certified, copies of documents filed with or issued by any State, Municipal, or Federal governmental agency.

(D) An opinion of counsel, when supported by (1) Evidentiary materials; (2) a statement by counsel that he or she is qualified to render the opinion; and (3) a statement that counsel has personally and diligently investigated the facts of the matter or, where counsel has not so investigated the facts, a statement that such opinion is based upon information which has been supplied to counsel and which is assumed to be true.

(ii) Before any administrative or judicial tribunal reviewing the decision of the responsible agency, any evidence admissible under the rules of such tribunal.

(d) Following any determination by a State regulatory authority or other State agency, or any decision by an administrative or judicial tribunal reviewing such determination, the State regulatory authority shall review the information in AVS to determine if it is consistent with the determination or decision. If it is not, the State regulatory authority shall promptly inform OSM and request that the AVS information be revised to reflect the determination or decision.

[59 FR 54355, Oct. 28, 1994; 59 FR 61656, Dec. 1, 1994]

PART 774—REVISION; RENEWAL; AND TRANSFER, ASSIGNMENT, OR SALE OF PERMIT RIGHTS

Sec.

774.1 Scope and purpose.

774.10 Information collection.

774.11 Regulatory authority review of permits.

774.13 Permit revisions.

774.15 Permit renewals.

774.17 Transfer, assignment, or sale of permit rights.

AUTHORITY: 30 U.S.C. 1201 *et seq.*, as amended; and Pub. L. 100-34.

SOURCE: 48 FR 44395, Sept. 28, 1983, unless otherwise noted.

§ 774.1 Scope and purpose.

This part provides requirements for revision; renewal; and transfer, assignment, or sale of permit rights.

§ 774.10 Information collection.

The collections of information contained in §§ 774.11, 774.13, 774.15 and 774.17 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029-0088. The information will be used to determine if the applicant meets the requirement for revision, renewal, transfer, sale, or assignment of permit rights. Response is mandatory in accordance with sections 102, 511, 506, and 507 of the Act.

[54 FR 13823, Apr. 5, 1989]

§ 774.11 Regulatory authority review of permits.

(a) The regulatory authority shall review each permit issued and outstanding under an approved regulatory program during the term of the permit. This review shall occur not later than the middle of each permit term and as follows:

(1) Permits with a term longer than 5 years shall be reviewed no less frequently than the permit midterm or every 5 years, whichever is more frequent.

(2) Permits with variances granted in accordance with § 785.14 of this chapter (mountaintop removal) and § 785.18 of this chapter (variance for delay in contemporaneous reclamation requirement in combined surface and underground mining operations) of this chapter shall be reviewed no later than 3 years from the date of issuance of the permit unless, for variances issued in accordance with § 785.14 of this chapter, the permittee affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the permit.